UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Nils J. Diaz
Edward McGaffigan, Jr.
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In the Matter of	
U.S. ENRICHMENT CORPORATION	Certificate GDP -1
	Docket No. 70-7001
(Paducah, Kentucky)	

CLI-01-23

MEMORANDUM AND ORDER

I. INTRODUCTION

In this Decision we review, pursuant to 10 CFR 76.45(e), the June 14, 2001, Director's Decision issued by the Director, Office of Nuclear Materials Safety and Safeguards (Director's Decision), denying the April 17, 2001, "Request for Director's Review of Staff Decision Certificate Amendment to U.S. Enrichment Corporation Paducah GDP," (Petition) filed pursuant to 10 CFR 76.45(d), on behalf of Daniel J. Minter, President of PACE Local 5-689 and members of PACE 5-689 (PACE or Petitioners). On July 16, 2001, the Petitioners, pursuant to 10 CFR 76.45(e), submitted an "Appeal to the Commission of Director's Decision" (Appeal) requesting the Commission's review of the Director's Decision. On July 31, 2001, the U. S. Enrichment

Corporation (USEC) submitted, as permitted by 10 CFR 76.45(e)(2), its reply to PACE's request for a Commission review.

Following the submittal of USEC's reply, Petitioners on August 10, 2001, submitted a "Motion for Leave to Reply, Supplement, or in the Alternative, Discovery" (Motion). USEC responded to this Motion on August 20, 2001. While the Commission's rules in 10 CFR 76.45 do not provide for filing the subject Motion, the Commission has accepted and considered it, along with USEC's reply, in this proceeding.

II. BACKGROUND

This proceeding arises out of an amendment the NRC issued on March 19, 2001, to the Paducah Gaseous Diffusion Plant Certificate which provided the authority for USEC to increase the enrichment capacity of the Paducah Gaseous Diffusion Plant (GDP).[1] The Petitioners in their April Petition requested that the amendment issued on March 19, 2001, be reconsidered and that the NRC conduct (1) the "reliable and economical" review asserted to be required by section 193(f) of the Atomic Energy Act of 1954, as amended (AEA),[2] the Commission's rules in

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[1] Letter from Eric J. Leeds, Chief, Special Projects Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Materials Safety and Safeguards to Morris Brown, Vice President Operations, USEC entitled Paducah Gaseous Diffusion Plant Certificate Amendment request: Higher Assay Upgrade Project (TAC No. L32415).

[2] Section 193(f) of the AEA provides

> LIMITATION.--No license or certificate of compliance may be issued to the United States Enrichment Corporation or its successor under this section or sections 53, 63, or 1701, if the Commission determines that--
> (1) the Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
> (2) the issuance of such a license or certificate of compliance would be inimical to--
> (A) the common defense and security of the United States; or
> (B) the maintenance of a reliable and economical domestic source of enrichment services.

10 CFR Part 76, and the public interest; and (2) make public the results of that review and seek comment on appropriate conditions that may be employed to bring USEC into compliance with the Atomic Energy Act (AEA).

In denying the Petition, the Director noted that the Petitioners had made no attempt to explain why their interests were affected by the issuance of the amendment.[3] There has been no showing that the Petitioners, who are members of the union at the Portsmouth GDP located in Piketon, Ohio, reside in the proximity of the Paducah plant located in Paducah, Kentucky, several hundreds of miles away from Piketon. Nonetheless, the Director considered several potential standing arguments that the Petitioners might have raised.

Petitioners might have asserted a general interest in maintaining reliable and economical domestic enrichment services. But the Director found that the Petitioners' interest would be a generalized grievance of broad public concern that would not be sufficient to confer standing under the Commission's adjudicatory decisions.[4] The Director also considered the Petitioners' interest in protecting employment positions at USEC's Portsmouth plant based on the Petitioners' assertion that there is a direct relationship between granting the amendment allowing higher enrichment at the Paducah plant and the decision to close the Portsmouth plant.[5] However, the Director concluded that maintaining employment in the face of a plant closing is an economic interest that is not within the zone of interests protected by the AEA, and, apart from the zone of interest test, the NRC has not interpreted the term "interest" to encompass the economic interest of employees. Consequently, the Director denied the Petition

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[3] Director's Decision at 3.

[4] Id. at 3-4.

[5] Id. at 4-5.

based on the Petitioners' failure to establish that they have the requisite interest to seek the Director's review under 10 CFR 76.45(d).[6]

While the Director denied the Petition based on a lack of standing, the Director nonetheless proceeded to address the Petitioners' basic arguments, which are found in an analysis of section 193(f) of the AEA and the Commission's regulations in 10 CFR Part 76. The Director concluded that

> in making determinations required by section 193(f)(2)(B), it [the NRC] should focus on the issue of entities, principally foreign entities, gaining control and undermining U.S. domestic enrichment capabilities which would be inimical to the interest of the United States, and that this review need only be conducted at the time of a proposed certification of a new owner or other transfer of control meeting the threshold of 10 CFR 76.65. Such a review is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.[7]

The Petitioners in their Appeal stated that the Commission is obliged to conduct a "reliable and economical" review in consideration of the certificate amendment requested by USEC in this proceeding, to make the results of that review public, and to seek comment on appropriate conditions that may be employed to bring USEC into compliance with the law. In support of their position the Petitioners raised two basic issues: first, that the Petitioners have standing to participate in this proceeding; and second, that the failure to perform the "reliable and economical" review stated in section 193(f) of the AEA is unlawful.

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[6] Id. at 5.

[7] Id. at 26.

III. ANALYSIS

A. Standing

Pursuant to 10 CFR 76.45(d), USEC or "any person whose interest may be affected," may file a petition requesting the Director of the Office of Nuclear Materials Safety and Safeguards (NMSS) to review an NRC staff determination on an amendment application. Similarly, 10 CFR 76.45(e) provides that USEC or "any person whose interest may be affected and who filed a petition for review or filed a response to a petition for review under section 76.45(d)," may file a petition requesting the Commission's review of a Director's decision. Thus, both paragraphs 76.45(d) and (e) limit eligibility for review as of right of a certificate amendment to those persons "whose interest may be affected." Thus, Petitioners' standing is a threshold issue.

The Commission has previously addressed the issue of standing in a Part 76 matter, indicating that for Part 76 proceedings petitioners should look to the Commission's adjudicatory decisions on standing. U.S. Enrichment Corp. (Paducah, Kentucky and Piketon, Ohio), CLI-96-12, 44 NRC 231, 236 (1996), citing Georgia Institute of Technology, CLI-95-12, 42 NRC 111, 115-17 (1995). In that case, which involved a request for review of a Director's decision on issuance of a certificate as permitted by 10 CFR 76.62(c),[8] the Commission, accepted the petitioners as "interested persons" despite a failure to meet the "obligation to explain their 'interested person' status." The Commission took this position because petitioners were appearing *pro se* and this was the first instance the Commission had considered petitions filed under Part 76. Id.

[8] The current Petition is based on 10 CFR 76.45. However, the Commission's interpretation of section 76.62(c) is directly applicable as its language is identical to section 76.45(d) and (e) in that it also limits eligibility for review to those persons "whose interest may be affected."

However, the Commission cautioned "that in future Part 76 certification decisions, it will expect Petitioners more specifically to explain their 'interested person' status." Id.

In order to fulfill this obligation, "[p]etitioners bear the burden to allege facts sufficient to establish standing."[9] To meet the Commission's standing requirements, a person must show that "(a) the action will cause 'injury in fact' and (b) the injury is arguably within the 'zone of interests' protected by the statutes governing the proceeding." Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). The person "must allege a concrete and particularized injury that is fairly traceable to the challenged action ...." Georgia Institute of Technology, 42 NRC at 115. A " 'generalized grievance' shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing." Metropolitan Edison Co., 18 NRC at 333; North Atlantic Energy Service Corp. (Seabrook Station, Unit 1) and Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 263 at n.5 (1999). See also Warth v. Seldin, 422 U.S. 490, 508 (1975). In order to assess whether an interest is within the "zone of interests" of a statute, it is necessary to "first discern the interests 'arguably ... to be protected' by the statutory provision at issue," and "then inquire whether the plaintiff's interests affected by the agency action are among them." National Credit Union Administration v. First National Bank, 522 U.S. 479, 492 (1998).

The Petitioners contend that the Commission has already granted them standing because PACE provided comments to the staff on the proposed amendment and the staff stated that it would consider PACE's comments in its review. The staff routinely considers information from a variety of sources in making a decision and frequently acknowledges such comments.

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[9] Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2), CLI-00-05, 51 NRC 90, 98 (2000).

However, the fact that a person submits comments that the staff stated that it would consider does not by itself mean that such persons have "an interest that may be affected" within the meaning of section 76.45. Such comments could reflect merely a "generalized interest" that is not a "concrete and particularized injury" within the zone of interests of the AEA.

The Petitioners, on appeal, contend that there are multiple and substantial bases for their participation in this matter.[10] Specifically, Petitioners argue that their interest is within the zone of interests of the AEA because:

> 1) the statutory condition that the GDPs continue to operate was, as recognized by the Administration, USEC, and by contractual commitment between USEC and the United States, one to which PACE members are a beneficiary;
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> 2) USEC's closing of the Portsmouth Plant, to which the Paducah upgrade is allegedly linked, is violative of rights and interests that flow to PACE and its members under the Privatization Act, and the contractual and further commitments thereunder;
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> 3) Section 3161 of the FY 1993 Defense Authorization Act, as embodied in section 3110 of the 1996 Privatization Act, further recognizes the linked interests of PACE members and the Nation in the weapons complex experience and expertise of Cold War Veterans.

Appeal at 12. In light of these interests, Petitioners contend that the Director was wrong in applying past precedents to conclude that the employment interests of PACE's members associated with the closing of the Portsmouth plant were outside the zone of interests of the AEA.

In discerning the interests arguably to be protected by section 193(f), we have looked to the words of the statute and its legislative history. As we understand our statutory mandate, NRC is to be concerned with ownership and control of the GDPs. Section 193(f) in its broadest reading is to provide for domestic enrichment services and addresses findings that the Commission shall make in issuing certificates. NRC's role in this area is to provide assurance

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[10] Appeal at 5-13.

that the certificates are not being issued or transferred to an entity that will undermine "the maintenance of a reliable and economical source of domestic enrichment services." The legislative history for section 193(f),[11] as well as the Privatization Act as whole,[12] makes it clear that the interest in a reliable and economical domestic enrichment services is a broad public interest. Providing for a domestic source of enrichment services protects the public interest by providing consumers of enrichment services access to domestic enrichment. In our view, that is the interest intended to be protected by section 193(f).

Thus, while PACE may have suffered an injury because of the actions of USEC, the question for standing purposes is whether the agency action caused an injury to PACE arguably to be protected by section 193(f) of the AEA. The Commission accepts for purposes of resolving the standing question - - specifically, of determining whether the Petitioners' interests are within the zone of interests to be protected by the AEA - - that there are provisions in the Privatization Act that address the interests of PACE,[13] that USEC made commitments to continue the operation of the GDPs,[14] and that Congress intended that the privatization process would provide for

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[11] The legislative history explains that section 193(f) was to address the potential of foreign control to the detriment of a domestic industry. Senate Report 104 -173, at 20 (1995). It states that the Commission can deny a certificate if issuing a certificate would be

> Inimical to the maintenance of a reliable and economical domestic source of enrichment services due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances. This provision was added to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern. (Emphasis in original).

[12] Section 3103 of the Privatization Act, 42 USC 2297h-1, among other things, required the privatization to provide for the " protection of the public interest in maintaining a reliable and economical domestic source of uranium ... enrichment ... services ...." (Emphasis added).

[13] See, e.g., section 3110 (Employee Protections), 42 USC 2297h-8.

[14] Agreement regarding Post-Closing Conduct, signed July 14, 1998. However, contrary to Petitioner's statements in their Appeal, section 1(c) of this agreement provides for circumstances when the plant can cease operation prior to the end of 2004. See also section

maintaining a reliable and economical domestic source of enrichment services.[15] Nor does the Commission dispute that the upgrade amendment facilitated the ability of USEC to expand the operations of the Paducah plant, that issuance of the amendment provided USEC with the flexibility to make a decision to close the Portsmouth plant, and that such action may have impacted PACE. However, the closure of the Portsmouth plant was not a decision made by the NRC, nor was it a required outcome of the issuance of the amendment for Paducah. In fact, there was nothing in the amendment or NRC requirements that would have prohibited USEC from operating both GDPs following the amendment. The decision to close the Portsmouth plant was made by USEC as a business judgment; the closure was not the consequence of any NRC regulatory requirement or direction. In fact, NRC does not have authority over the business judgments that USEC made concerning the Portsmouth plant: the closure of a GDP is a matter that is not governed by statutes which the Commission is charged with implementing.[16] Thus, any injury suffered by PACE was not a direct result of the Commission's actions.

The Petitioners also argue that the privatization provisions in the statutes and contractual agreements referenced by them which are in their view intended to protect the interests of PACE's members demonstrate that the interests protected by the statute include the

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3110(a)(5), 42 USC 2297h-8(a)(5)(contemplating plant closing).

[15] Sections 3103 (a) and 3104 (b). 42 USC 2297h-1 and 2.

[16] Unlike the provisions in section 108 of the AEA concerning facilities licensed under sections 103 and 104, the NRC does not have the authority to require USEC to continue to operate a GDP. Similarly, NRC does not have the authority to prevent USEC from choosing to cease operation. Thus, it is unnecessary for the Commission to resolve the differences in views concerning the circumstances that gave rise to the shutdown of the Portsmouth plant raised in the affidavits filed by USEC and the Petitioners in this proceeding. Declaration of J. Morris Brown and Declaration of Daniel J. Minter, and the August 1, 2001 Motion and USEC's reply to it. The appropriateness of the business judgments of USEC concerning the closure of the Portsmouth plant is not a matter within the Commission's jurisdiction.

employment interests of PACE. However, these provisions are implemented by executive agencies other than the Commission. The privatization provisions are too distant from and do not relate to the Commission responsibilities under section 193(f).

Air Courier Conference v. Postal Workers, 498 U.S. 517(1991), illustrates the nexus that must be demonstrated between the petitioners' interests and the statutory provisions at issue. In Air Courier the Supreme Court rejected the standing arguments that the employment interests of Postal Service employees were arguably within the zone of interests protected by a statute whose purpose was to increase the revenues of the Post Office and to ensure that postal services were provided in a manner consistent with the public interest. In that case, the Court recognized that portions of the Postal Reorganization Act (PRA) protected employment opportunities of postal workers, but that the provision of the PRA at issue in the case was not designed to protect postal employment or future job opportunities; rather, they were intended to serve the nation as a whole. Id. at 528. The Court concluded that "it stretched the zone-of-interest test too far" to say that because a person was protected under one portion of the PRA, the person can challenge any other portion of it. Id. at 530.

Like the provisions that protected the employment interest of the postal workers in Air Courier Conference, the privatization provisions cited by Petitioners do not expand the zone of interests to be protected by section 193(f) to include the employment interests of the Petitioners. To the extent that the Petitioners interests would be protected by a section 193(f) decision, they would be "incidental beneficiaries" of the decision making. National Credit Union at 494, n7.[17]

[17] Even if the Petitioners are more than merely an incidental beneficiary of the statute, that fact does not mean that the zone-of-interest test is satisfied. American Federation of Government Employees, Local 2119 v. Cohen, 171 F.3d 460 (7th Cir. 1999); TAP Pharmaceuticals v. HHS, 163 F.3d 199, 206(4th Cir. 1998). In TAP the court held that TAP's interests in selling pharmaceuticals were outside the zone of interest of a statute that was intended to provide reasonable and necessary medical services even though TAP's revenues would be affected by

While aspects of the Privatization Act may benefit the Petitioners, their interest in decisions under section 193(f) is a generalized interest to preserve domestic capability shared in substantially equal measure by all or a large class of citizens.[18] A generalized grievance of broad public concern is not a sufficient interest to confer standing under the Commission's adjudicatory decisions. See Three Mile Island, CLI-83-25, 18 NRC at 333.

Thus, the Petitioners have not provided a sufficient basis for the Commission to change its long held view that maintaining employment in the face of a plant closing is an economic interest that is not within the zone of interests protected by provisions of the AEA, which the Commission is charged with implementing.[19] Similarly, we are unpersuaded that we should change the view that the term "interest" as used in the Commission's standing regulations does not encompass the economic interests of employees.[20] The Commission affirms the Director's finding that the Petitioners have not demonstrated the requisite interest to seek review under 10 CFR 76.45(d).

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the government's actions. TAP, 171 F.3d at 208.

[18] In addressing standing, the Director noted that the Petitioners were members of the union at the Portsmouth plant and the amendment involved only the Paducah plant. The Petitioners argue that if the Commission focused on the company as a whole, and if the Commission were to agree with the Petitioners' reading of section 193(f), they would have standing. The Commission disagrees. The central issue is the interest to be protected by the statutory provision. As set out above, that interest is not the economic interest of the union, but the public interest in a domestic source of enrichment. Thus, the Petitioners' interest is a general one shared by members of the public at large.

[19] The Commission in the past has found both the economic interests of a competitor and of employees in preserving employment to be outside the statutes governing the NRC. Cf., Quivira Mining Co., CLI-98-11, 48 NRC 1, 8-17 (1998), affirmed, Envirocare of Utah, Inc. v NRC, 194 F.3d 72 (D.C. Cir. 1999) (holding that an entity's competitive interests do not bring it within the zone of interest of either the AEA or the National Environmental Policy Act (NEPA) for the purpose of policing a competitor's compliance with licensing requirements); Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (holding that the loss of employment does not fall within the zone of interests protected by NEPA).

[20] Envirocare of Utah v. NRC, 194 F.3d 72 (D.C. Cir. 1999).

Consequently, the Commission concludes that the Petitioners have not demonstrated the requisite interest to seek review under 10 CFR 76.45(e).[21]

Accordingly, the Commission dismisses this appeal on the basis that the Petitioners have not met the standing requirements under 10 CFR 76.45(e). However, in light of the issues raised by the Petitioners concerning the Director's interpretation of section 193(f) of the AEA, the Commission will address PACE's principal assertions regarding the application of section 193(f) of the AEA.

B. APPLICATION OF SECTION 193(f) OF THE ATOMIC ENERGY ACT

The Petitioners make two main arguments. The Petitioners claim that the Director's Decision is:

1) at odds with the plain meaning of section 193(f)(2)(B) of the AEA and its legislative intent, and

2) contradicts contemporaneous interpretations of section 193(f)(2)(B).

These issues were previously resolved by the Director on the basis of a detailed analysis of section 193(f)(2)(B) and its legislative history.[22] The Director reasoned that the plain words of

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[21] The Commission notes that PACE has participated in Freedom of Information Act litigation involving the GDPs. Oil, Chemical & Atomic Workers v. DOE, 141 F.Supp. 2d 1 (D.D.C. 2001). In that case the Court stated that PACE's participation served the public interest. However, such participation in one proceeding does not automatically grant standing in another proceeding based on a different statute. Thus, the extent of participation of USEC in that litigation, which was addressed in the August 1, 2001 motion of the Petitioners and responded to by USEC on August 17, 2001, is not relevant to this proceeding.

[22] Petitioners state that the Director's conclusions are "based on a still secret analysis." Appeal at 4; Petition at 22. Presumably, petitioners are referring to advice of counsel that was referenced in correspondence from Chairman Meserve to Representative Tom Bliley, Chairman, Committee on Commerce, United States House of Representatives, dated September 11, 2000. The Director's Decision speaks for itself and the basis for the decision is set forth therein. Similarly, this decision speaks for itself.

the statute addressed issuance of certificates and did not consider amendments. The Director stated

> that in making determinations required by section 193(f)(2)(B), it [the staff] should focus on the issue of entities, principally foreign entities, gaining control and undermining U.S. domestic enrichment capabilities which would be inimical to the interest of the United States, and that this review need only be conducted at the time of a proposed certification of a new owner or other transfer of control meeting the threshold of 10 CFR 76.65. Such a review is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate. [23]

The Commission is unpersuaded by the various arguments that the Petitioners have made to challenge this finding. For the most part, the Petitioners have repeated the same arguments that were raised before the Director and addressed in his Decision and, thus, the Commission need not address them in any detail here. Nevertheless, we comment on several points raised by the Petitioners.

1. Section 193(f) Is not applied to the Issuance of an Amendment

The Director concluded that the review required by section 193(f) does not apply to the issuance of an amendment in the absence of a change in ownership or control (which would require issuance of a new certificate) and does not create a recurring obligation. The Petitioners disagree, contending that NRC has a continuing obligation "to oversee USEC adherence to a course that will ensure a reliable and economical domestic source of enrichment services."[24] But Petitioners provide no authority for their position other than an assertion of broad public interest. Section 193(f) explicitly states "[n]o license or certificate of

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[23] Director's Decision at 26.

[24] Appeal at 17. The Commission notes that the amendment increased the capability of USEC to provide domestic enrichment services. As described above, it was USEC's actions based on its business judgment, over which NRC had no control, that caused the Portsmouth GDP to cease operation.

compliance may be issued... ." There is nothing in the statute or the legislative history to suggest that section 193(f) should be applied in situations other than certificate issuances. The Director showed that the section 193(f) reviews are not required at the time of recertifications for a GDP or in connection with other events that do not involve a change in control, such as the upgrade amendment at issue in this matter, and we agree with that conclusion.[25]

In addition to the language of section 193(f) itself, we find it persuasive that the AEA establishes in section 1701(c)(4) a requirement for the Commission to make periodic findings concerning the status of the operation of the GDPs. Congress was clearly aware of this provision of the AEA at the time of enactment of section 193(f) because it amended this section as part of the USEC Privatization Act.[26] The section specifically states that the NRC is to focus on health, safety, and the common defense and security. The NRC was not charged with a recurring obligation to consider whether USEC was continuing to maintain a reliable and economical source of domestic enrichment services. The absence of such a provision as part of the NRC's recurring obligation is clear evidence that the NRC was not expected to have a continuing obligation to consider the vitality of the domestic enrichment industry.[27]

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[25] Director's Decision at 15-19. The Petitioners also argued that a different result was warranted here as the subject amendment was not "routine." Appeal at 14-15. However, regardless of the uniqueness, complexity, or importance of an amendment, the central issue for application of section 193(f) is whether the amendment involves a transfer of control. There was no transfer of control associated with the subject amendment.

[26] The frequency of recertification in section 1701(b)(2) was amended by section 3116(b)(3) of P.L. 104-134.

[27] The Congress also did not give the Commission the authority to require USEC or its successors to continue to operate the GDPs to provide for a domestic enrichment source. This is in contrast to section 108 of the Atomic Energy Act, which states that the Commission, if Congress declares a state of war or national emergency, has the authority to require production and utilization facilities to continue to operate if necessary for the common defense and security.

Moreover, the Petitioners' interpretation of the statute would essentially place NRC in the position of being a promoter of domestic enrichment capability by having NRC oversee "adherence to a course that will ensure a reliable and economical domestic source of enrichment services." Such a role is inconsistent with the role of a safety regulator. It would place the NRC in the position of having to balance the need for safety actions against preserving economic viability. In fact, the very purpose of establishing NRC was to separate the promotional and development functions of the Atomic Energy Commission from the oversight and licensing functions.[28] We believe clear legislative intent is necessary before we would interpret section 193(f) as requiring such a significant departure from the singular regulatory role of the NRC. There is no such intent here.

2. The Focus of Section 193(f) Is Principally Foreign Entities

The Petitioners argue that the Director ignored the plain language of the statute in not finding that the "reliable and economical" provision of section193(f)(2)(B) is independent of the "foreign ownership" test of section 193(f)(2). The Director confronted the fact that in the final language of section 193(f)(2), the concept of foreign control was separated from the provision on maintaining a domestic source of enrichment services; he did not ignore it. [29] As noted in the Decision, the legislative history explains that the NRC may deny a license or certificate of compliance if issuance of a license or certificate would be

> inimical to the maintenance of a reliable and economical domestic source of enrichment services due to the nature and extent of the ownership, control or domination of the

[28] Section 2(a) of the Energy Reorganization Act of 1974, as amended. It is clear that NRC was established to address "the criticism of the mixture of development and regulatory functions within the AEC." House Report 93-707, at 4 (1973) and Senate Report 93-980, at 2 (1974).

[29] Director's Decision at 19.

> Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances. [30]

Petitioners' construction not only is inconsistent with the legislative history, but also would have the NRC delving into matters of economic viability which are unrelated to NRC's traditional role as a regulator of radiological health and safety, and the common defense and security.[31] In our view, the Director appropriately considered the language in section 193(f), its latent ambiguities, its legislative history, and the regulatory scheme established under the AEA in construing the statute.[32] He properly concluded that section 193(f) provides for two related tests:

> 1) is the certificate holder to be owned, controlled, or dominated by a foreign entity, and 2) if the certificate holder is not to be owned, controlled, or dominated by a foreign entity, is the certificate holder likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to a) the common defense and security, or b) maintaining a domestic enrichment capability.[33]

3. The Commission Is Not Bound by the Draft SRP

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[30] S. Rpt. 104-173, at 20 (1995). See also the report of the House Commerce Committee on its version of the Privatization Act which stated that

> uranium enrichment activities will be subject to the same foreign ownership limitations as any other nuclear production or utilization facility. It is expected that any interpretation of the terms in new subsection (f) would be consistent with the historical administrative interpretation of similar language in sections 103, 104, and 1502(a) of the AEA.

H. Rpt. 104-86, at 20 (1995). While the language of the House bill was different than the Senate's, it reflects the focus on foreign involvement.

[31] Looking to the legislative intent is warranted when a statute appears to depart from the normal regulatory scheme. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 24 (1976). See also United States v. American Trucking Ass'n, 310 U.S. 534, 543-44 (1940).

[32] Director's Decision at 19 -23. See also note 31. In Train, the Court noted that "when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Train, 426 U.S. at 10. See also Ann v. United States, 205 F3d. 1168, 1175 (9th Cir. 2000); Owen v. Magaw, 122 F.3d 1350, 1354 (10th Cir. 1997).

[33] Director's Decision at 20.

The Petitioners take issue with the Director's reliance on Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) and Kansas Gas and Electric Co., (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), in light of the recent Supreme Court decision in United States v. Mead , __ U.S. __, 121S.Ct. 2164, 2001 WL 672258 (June 18, 2001). The Mead decision, which focused on the scope of deference offered by courts to agency interpretations was issued three days after the issuance of the Director's decision.[34]

The Director in addressing the authority to reconsider the position reflected in the Staff's draft Standard Review Plan (SRP), cited Chevron and Wolf Creek for the proposition that agencies can change their positions. The Mead case did not undermine the reality, reflected in Chevron, that agency interpretations are not carved in stone, but rather must be subject to reevaluation of their wisdom on a continuing basis.[35] The Petitioners would have the Commission bound to apply a draft staff SRP that had never been applied to an amendment.[36] The Director fully addressed the basis for the NRC changing its position from the draft SRP and why the Commission was not bound by the draft SRP.[37]

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[34] The issue in Mead was the deference due to one tariff classification ruling out of more than 10,000 issued a year by Customs' headquarters and by 46 different Customs' offices. The Court held that such rulings did not have the force of law and were not entitled to deference under Chevron, but were entitled to respect based on their individual "power to persuade."

[35] Chevron, 467 U.S. at 863-864.

[36] The Petitioners, citing SECY 00-0181, August 24, 2000, noted that the staff did perform a financial analysis pursuant to the draft SRP following USEC's credit downgrading. However, as the Director noted, it was the result of the change in credit rating that led to the reconsideration of the position in the draft SRP and resulted in the views the Commission provided its Congressional oversight committees in letters dated September 11, 2000.

[37] Director's Decision at 23-26. See also International Uranium (USA) Corp., CLI-00-1, 51 NRC 9, 19 (2000) (where the Commission held it was not bound by NRC's Alternative Feed Guidance): "Like NRC NUREGs and Regulatory Guides, NRC Guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations." Id., at 19.

IV. CONCLUSION AND ORDER

The Commission has given careful consideration to the Petitioners' arguments and USEC's responses. The Commission agrees with the Director's determination that Petitioners have not demonstrated the requisite interest to seek review under 10 CFR 76.45 as a matter of right. Further, the Director has fully considered the statutory language and the relevant legislative history. As explained above, the Commission has adopted the Director's Decision and analysis as the appropriate interpretation of section 193(f)(2)(B) of the AEA. The review defined by section 193(f)(2)(B) is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.

The public policy issues raised by Petitioners are more appropriately raised before the Congress or before executive agencies and departments that report to the President.

For the reasons stated in this Decision, the Commission denies the Appeal of the Petitioners submitted pursuant to 10 CFR 76.45(e) and adopts the June 14, 2001, Director's Decision.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
This 14th day of November, 2001